



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 28, 2003

Ms. Mary D. Marquez
Legal/Records Manager
Capital Metro Transportation Authority
2910 East 5th Street
Austin, Texas 78702

OR2003-3609

Dear Ms. Marquez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 181773.

The Capital Metropolitan Transportation Authority ("Capital Metro") received a request for a copy of the proposal, including attachments, submitted by Overland Resources, Inc. ("Overland") in response to Request for Proposal number 9070. You inform us that you have released some of the requested information; however, at the direction of Overland, you have submitted the remainder of the responsive information for our review. We have received comments from Overland in which Overland supplies objections to release of its financial information based on sections 552.104 and 552.110 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have reviewed the information you submitted and we have considered the exceptions claimed by Overland.

Section 552.104 states information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Here, Overland has asserted

this exception, not Capital Metro. Therefore, Capital Metro may not withhold the submitted information based on Overland's assertion of section 552.104 of the Government Code.

Section 552.110 protects: (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110. Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on *specific factual evidence* that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b) (emphasis added). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

To establish the applicability of section 552.110, Overland informs us that the requestor directly competes with Overland in a relatively narrow field of real estate solutions. Because of this direct competition, Overland explains release of the submitted information, which includes three years of data concerning gross and net revenues, cost of operations, profit margins and various specified cost centers, would give the requestor a competitive advantage in present and future negotiations and bid proposals. Further, Overland states it is currently involved in active litigation with the requestor and issues include claims by Overland of unfair competition and usurpation of business opportunities by the requestor. Notably, Overland advises us that the requestor has sought the production of the financial information at issue here through the discovery process of the pending litigation. Overland explains it has raised similar objections to the production of such information and, as of the date of its letter to this office, the court has not considered this issue. Based on Overland's representations and our review of the submitted documents, we conclude Overland has established that they constitute financial information, the public disclosure of which would cause Overland substantial competitive harm. *See* Gov't Code § 552.110(b). Accordingly, Capital Metro must withhold the submitted information from the requestor under section 552.110(b) of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.*

§ 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

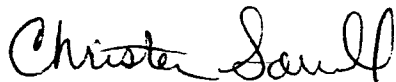
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Christen Sorrell". The signature is written in a cursive, flowing style.

Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 181773

Enc: Submitted documents

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